IN THE

Supreme Court of the United States

October Term, 1957.

No. 684

D. B. LEWIS, President, Lewis Food Company; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA, ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, Secretary-Treasurer, of Association of Independent Workers of America,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR CERTAIN PETITIONERS.

I.

Section 7(b) of the Administrative Procedure Act Does Not Authorize Trial Examiners of the National Labor Relations Board to Rule on Petitions to Revoke Subpoenas.

The Board in its brief turns to Section 7(b) of the Administrative Procedure Act as an alternative, or additional, source of authority for trial examiners to rule on petitions to revoke subpoenas. Thus, the Board says

in its Summary of Argument (Brief for the Board, p. 8) that "Independently of the Labor Act, Section 7(b) of the Administrative Procedure Act provides an alternative source of authority for trial examiner determinations as to the validity of subpoenas." The argument is amplified by the Board under Point I of its argument (Brief for the Board, pp. 13-24).

This attempt to utilize Section 7(b) of the Administrative Procedure Act as an alternative and independent source of authority for trial examiners to rule upon petitions to revoke subpoenas is completely unsound.

Section 7(b) of the Administrative Procedure Act provides:

> "Officers presiding at hearings shall have authority, subject to the published rules of the agency and *within its powers*, to . . . (2) issue subpoenas *authorized by law*." (Emphasis added.)

Section 6(c) of the Administrative Procedure Act provides:

> "Agency subpoenas *authorized by law* shall be issued to any party upon request. . . ." (Emphasis added.)

What do the emphasized words "within its powers" and "authorized by law" mean? They mean that the hearing officer has subpoena powers only to the extent that the agency itself has such powers. This is clear both from the words of the statute and the Legislative History. Both House and Senate Committees said with reference to Section 7(b):

> "This section does not expand the powers of agencies." (Sen. Doc. No. 248, 79th Cong., 2nd Sess., 207, 269 (1946).)

At an earlier time the Senate Committee said:

> "It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation." (*Id.* at 29-30).

The words "within its powers" and "authorized by law" specifically prevent Section 7(b) and Section 6(c) of the Administrative Procedure Act from being utilized as a source of the subpoena power by agencies which had not otherwise been given the subpoena power. Thus, at the time of the enactment of the Administrative Procedure Act, agencies lacking the power to issue subpoenas included the Post Office Department, the War Department, the National Railroad Adjustment Board and the National Mediation Board. Virtually all agencies lacked the power to rule on petitioners to revoke subpoenas. In case of contest over a subpoena, the courts settled the question. Compare Section 6(c) of the Administrative Procedure Act.

The result is that a trial examiner of the Labor Board had only the powers possessed by the agency at the time of the passage of the Administrative Procedure Act. If the agency did not have the power to issue and/or revoke subpoenas, then the trial examiner had no such powers.

What then were the powers possessed by the National Labor Relations Board at the time of the passage of the Administrative Procedure Act. Section 11 of the Wagner Act provided that:

> "Any member of the Board shall have *power to issue subpoenas* requiring the attendance and testimony of witnesses and the production of any evi-

dence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation." (Emphasis added.)

Under the Wagner Act, therefore, the Labor Board itself had only the power to issue subpoenas and did not have the power to revoke them. In case of a contest, the courts determined the validity of the subpoena. It follows that during the time that the Wagner Act and the Administrative Procedure Act were in effect, neither the Labor Board nor the examiners of the Board had power to revoke subpoenas.

This was the situation at the time that the National Labor Relations Act was passed in 1947. For the first time the National Labor Relations Board was given power to rule on petitions to revoke subpoenas. The language of Section 11 of the National Labor Relations Act, as amended in 1947, shows that Congress intended that the Board itself should exercise this power. The legislative history demonstrates that Congress expressly took the power away from trial examiners.

From what source then, does the trial examiner of the Board derive power to rule on subpoenas to revoke subpoenas? It certainly does not come from Section 11 of the National Labor Relations Act, as amended, since Congress expressly refused to give trial examiners the power to revoke subpoenas. The power was given to the Board alone. It certainly does not come from Section 7(b) of the Administrative Procedure Act, for the reason that under the Wagner Act, the Labor Board itself did not have power to rule on petitions to revoke subpoenas and Section 7(b) did nothing more than to

confer on trial examiners the same powers which the agency possessed at the time of the passage of the Administrative Procedure Act.

Section 6(c) of the Administrative Procedure Act provides, in effect, that when there is any question as to the validity of any subpoena "the court" shall determine its validity. Here is a complete answer to the contention of the Board that Section 7(b) of the Administrative Procedure Act "may reasonably be deemed" to confer full subpoena power upon trial examiners of the Board (Board Br. p. 8). Under Section 7(b) hearing officers are given authority to "issue subpoenas authorized by law." That is the extent of their authority. If there is any question about the validity of the subpoena, then Section 6(c) of the Act comes into play and the power to determine the validity of the subpoena is conferred upon "the court." Section 6(c) of the Administrative Procedure Act negates any attempt on the part of the Board to confer full subpoena powers upon Board trial examiners.

We submit, therefore, that Section 7(b) and Section 6(c) of the Administrative Procedure Act, when considered in the light of the legislative history of the Act relating to the words "within its powers" and "authorized by law" demonstrate conclusively that trial examiners of the Labor Board do not have the power to rule on petitions to revoke subpoenas.

II.

There Has Been No Final Administrative Action by the Board Which Is a Prerequisite to Judicial Enforcement of Review.

The Board contends in its brief in *National Labor Relations Board v. Duval Jewelry Company*, No. 234, that individuals subpoenaed by the Board have failed to exhaust their administrative remedy of a special appeal to the Board pursuant to Board regulations, and, therefore, this Court should order summary enforcement of the subpoenas. This contention was not made in the instant proceedings. However, we think that it is the Board that has failed to exhaust internal remedies and that the Board is premature in seeking enforcement of the subpoenas in the Federal District Court. In the *Duval* case, *supra*, the Fifth Circuit Court of Appeals held that, insofar as *subpoenas duces tecum* are concerned, the application for enforcement in the Federal District Court by the Board was premature, because the Board did not itself under Section 11(1) of the National Labor Relations Act, as amended, consider and rule on the petitions to revoke subpoenas. In the *Duval* case it is said that the Board's jurisdiction to pass on petitions to revoke *subpoenas duces tecum* is original, not appellate, and that the denial of the petitions by the trial examiner was a mere nullity. The Court also held that respondents (petitioners in this case) were not required to request "special permission of the Board" to appeal. The holding of the Fifth Circuit in the *Duval* case is that, until the Board itself has passed upon the petition to revoke subpoenas, there is no "contumacy or refusal to obey a subpoena" (see Section 11(2) of the National Labor Relations Act, as amended) and the matter of the enforcement

of the subpoenas is not ripe for the consideration of the Federal District Court. It is the view of the Fifth Circuit that the District Court should under such circumstances decline to rule upon the enforcement of the *subpoena duces tecum*.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the District Court with directions to quash the subpoenas forthwith, or, in the alternative, to refuse to entertain the proceedings on the ground that there has been no final administrative action which is a prerequisite to judicial enforcement or review.

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